

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION**

TIMOTHY B. BOSTIC, <i>et al.</i> ,)	
)
Plaintiffs,))
)
v.)	Civil Action No. 2:13-cv-00395
)
ROBERT F. McDONNELL, KENNETH))
T. CUCCINELLI, II, and GEORGE))
E. SCHAEFER, III, in their official capacities))
)
Defendants.))

**MEMORANDUM IN SUPPORT OF MOTION TO DISMISS
GOVERNOR McDONNELL AND ATTORNEY GENERAL CUCCINELLI
ON SOVEREIGN IMMUNITY GROUNDS**

The Eleventh Amendment provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI. Despite the limitations of its text, the Eleventh Amendment also bars suits brought by citizens of the State being sued. *Principality of Monaco v. Mississippi*, 292 U.S. 313 (1934); *Hans v. Louisiana*, 134 U.S. 1 (1890). Likewise, the bar of the Eleventh Amendment extends to any officer of state, *Minnesota v. Hitchcock*, 185 U.S. 373 (1902), unless the *Ex Parte Young*, 209 U.S. 123 (1908), exception applies. That exception permits a Federal court to issue prospective, injunctive relief against a state officer to prevent ongoing violations of Federal law, on the rationale that such a suit is not a suit against the State for purposes of the Eleventh Amendment. *McBurney v. Cuccinelli*, 616 F.3d 393, 399 (2010). A central limitation on the exception is that the state officer must have a "special relationship" with the "challenged statute." *Id.* "This requirement of 'proximity to and responsibility for the challenged state action is not met when an official merely possesses '[g]eneral authority to enforce the laws of the

state.'" *Id.* (emphasis in original) (citations omitted); *see also Waste Mgmt. Hldgs. v. Gilmore*, 252 F.3d 316, 331 (4th Cir. 2001) (requiring that the plaintiff show that the Governor has a "specific duty to enforce" the challenged law for the *Ex parte Young* exception to apply). And this Circuit has instructed courts "to resolve Eleventh Amendment immunity questions as soon as possible"—at the threshold—to preserve the jurisdictional nature of the States' immunity, which is not merely a "defense to liability," but an "immunity from suit." *See Constantine v. Rectors & Visitors of George Mason Univ.*, 411 F.3d 474, 482 (4th Cir. 2005).

Limitations on eligibility to marry in Virginia, including those identified by Va. Const. art. I, § 15-A and Va. Code Ann. §§ 20-45.2 and -45.3, are enforced by withholding a marriage license as happened in this case. Complaint ¶¶ 6, 17; (Doc. 1 at 3, at 6 of 12). Neither the Governor nor the Attorney General have any proximity to, responsibility for, or a special relationship with the laws of marital eligibility. As a consequence both should be dismissed on the grounds of sovereign immunity. *See McBurney*, 616 F.3d at 402.

Respectfully submitted,

/s/

E. Duncan Getchell, Jr.
Solicitor General of Virginia
(VSB No. 14156)
Office of the Attorney General
900 East Main Street
Richmond, Virginia 23219
(804) 786-7240 – Telephone
(804) 371-0200 – Facsimile
dgetchell@oag.state.va.us
Counsel for Defendants McDonnell and Cuccinelli

Kenneth T. Cuccinelli, II
Attorney General of Virginia

Wesley G. Russell, Jr., VSB #38756
Deputy Attorney General
E-mail: wrussell@oag.state.va.us

Michael H. Brady, VSB #78309
Assistant Solicitor General
E-mail: mbrady@oag.state.va.us

CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of August 2013, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, and that I also sent a filed copy of the same to the following by U.S. Mail, postage prepaid:

Thomas B. Shuttleworth, Esq., VSB # 13330

Robert E. Ruloff, Esq., VSB # 13471

Charles B. Lustig, Esq., VSB # 29442

Shuttleworth, Ruloff, Swain,

Haddad & Morecock, P.C.

4525 South Blvd., Ste. 300

Virginia Beach, VA 23452

(757) 671-6000 (phone)

(757) 671-6004 (fax)

/s/

E. Duncan Getchell, Jr.